

No. 12502

United States
Court of Appeals
For the Ninth Circuit.

W. E. BUELL, Trustee for the Bond Holding
Creditors of the Montague Water Conservation
District,

Appellant.

vs.

MONTAGUE WATER CONSERVATION DIS-
TRICT, Bankrupt, and THE CITY OF
MONTAGUE,

Appellees.

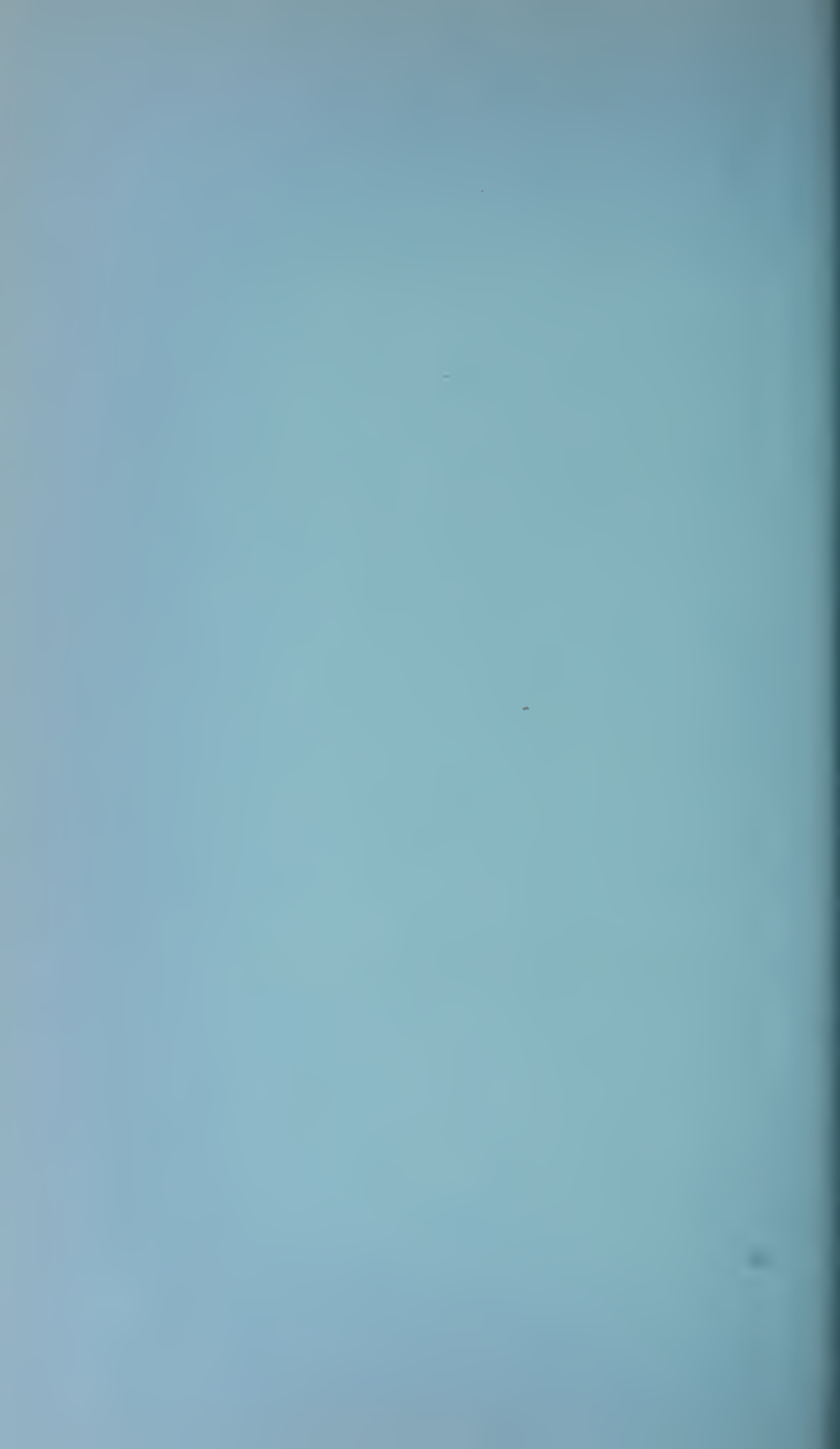
Transcript of Record

Appeal from the United States District Court
Northern District of California,
Northern Division.

FILED
MAY 4 - 1950

PAUL P. O'BRIEN,

CLERK



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For the Ninth Circuit.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Petition for Equitable Relief.....	9, 12
Certificate of Clerk to Record on Appeal.....	37
Designation of Contents of Record on Appeal..	26
Designation of Points Relied Upon Appeal....	25
Findings of Fact and Conclusions of Law.....	18
Judgment	22
Memorandum	15
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	24
Notice of Motion to Strike.....	8
Order Extending Time to Docket Appeal....	24, 27
Petition for Equitable Relief.....	2
Reporter's Transcript of Proceedings on Petition for Equitable Relief and Motion to Strike	28
Stipulation	14

NAMES AND ADDRESSES OF ATTORNEYS

SAMUEL R. FRIEDMAN, ESQ.,

Attorney for Petitioner.

Warrens Building,
111 South Broadway,
Yreka, California.

BARR AND HAMMOND,

J. EVERETT BARR, ESQ.,

Attorneys for Trustee.

Warrens Building,
Yreka, California.

In the United States District Court for the Northern District of California, Northern Division.

No. 10503

In the Matter of the:

MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

PETITION FOR EQUITABLE RELIEF

Comes now the City of Montague, a municipal corporation of the State of California, and alleges and represents to this Honorable Court as follows, to wit:

I.

That the City of Montague is a municipal corporation of the State of California, duly organized and existing under the laws of the State of California as a City of the Sixth Class.

II.

That the Montague Water Conservation District is a public corporation of the State of California, duly organized and existing under the laws of the State of California, as more fully appears in the files of this Court respecting this action.

III.

That W. E. Buell has heretofore constituted and appointed and now is the Trustee in Bankruptcy

in the above-entitled matter and does represent the bond holding creditors of the bankrupt district.

IV.

That pursuant to proceedings had and taken in this Court, the Montague Water Conservation District and the creditor bond holders having claims against said district did on the 6th day of December, 1943, enter into a composition agreement approved by this Court on March 4, 1944, wherein the rights and obligations of said creditor bond holders and said Montague Water Conservation District were set forth; that said agreement last above referred to and the files and records of this Court appertaining thereto are incorporated in this Petition as the same may appear of record herein, as though the same were fully set forth herein, the same being hereby adopted by reference to the files of this Court; that at no time was any notice of any character whatsoever, as provided by law, given to your petitioner, The City of Montague, indicating or giving notice of any liability against the properties of said city, hereinafter described, by reason of the said composition agreement above referred to.

V.

That your petitioner, The City of Montague, is the owner in fee of and in possession of all of those certain lands, premises and appurtenances thereto, situate, lying and being in the County of Siskiyou,

State of California, and more particularly described as follows, to wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-Five North (T 45 N), Range Six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

That the above described premises so owned by said City of Montague are devoted to a governmental purpose and are used for municipal and governmental purposes consisting of a publicly owned airport, sewage disposal and fire protection.

VI.

That for the fiscal year 1945-46, the Fiscal Officers did cause to be levied upon the above-described property of your petitioner and to appear upon the assessment rolls of said district on assessment and tax for the servicing and retirement of delinquent district bonds and interest thereon in said district, that authority for such levy does not appear in the minutes or records of said district; that at all times herein mentioned, the above-described property of your petitioner was and now is devoted to a public use as herein set forth.

VII.

That in the fiscal year 1946-47 the Fiscal Officers of said district did again assess and endeavor to impose upon the property of the petitioner, above-

described, an additional levy for the servicing of said delinquent Irrigation District Bonds.

VIII.

That prior to the 4th day of March, 1944, and prior to the confirmation of the above-referred to composition agreement between the said W. E. Buell and the Montague Water Conservation District, notices were given to the property owners to be affected by the terms of said agreement; that said notices were given in a manner approved by this Court; that no notices of any kind or nature were given to your petitioner under said agreement above referred to, affecting the property in this petition described, and that said agreement purposely omitted the property of petitioner as said property is hereinabove described.

IX.

That your petitioner is informed and believes, and upon such information and belief alleges that the action of the Fiscal Officers of said Montague Water Conservation District were caused and induced by said W. E. Buell, as Trustee for the bond holders, and that but for the activities and representations of said Buell and his counsel, the officers of said Montague Water Conservation District would not have endeavored to impose a levy upon the property of your petitioner, above-described; that at all times herein mentioned, said Buell knew that said municipally owned property

of petitioner was not included in said composition agreement above referred to.

X.

That unless prevented by Order of this Court, the Officers of said Montague Water Conservation District will cause a deed to be issued to said W. E. Buell, Trustee for said bond holders, covering said municipal property of petitioner, the City of Montague, as said property is in this petition described.

Wherefore, your petitioner prays judgment as follows:

(1) That the Honorable Court above-entitled decree the rights of the parties hereto;

(2) That it be decreed that the bankrupt Montague Water Conservation District be not entitled to levy any bond assessment against the property of your petitioner and described in the complaint.

(3) That this Court decree that the Trustee in Bankruptcy and the said bankrupt are not entitled to have recourse to the property and lands in the Complaint described as belonging to the City of Montague as in this petition set forth.

(4) That this Court decree such other and or different relief as may seem proper in the premises and that your petitioner may have its costs of suit herein.

/s/ SAMUEL R. FRIEDMAN,

Attorney for City of Montague.

State of California,
County of Siskiyou—ss.

Jesse Jones, being first duly sworn deposes and says:

That he is the duly elected, qualified and acting Mayor of the City of Montague, State of California, and as such he is authorized to execute this verification in behalf of said City of Montague; that he knows the verity of the foregoing petition and the contents thereof and that the same is true of his own knowledge, except where therein stated on information or belief and as to such matters he believes it to be true.

/s/ JESSE C. JONES,

Mayor.

Subscribed and sworn to before me this 29th day of November, 1948.

[Seal]: /s/ SAMUEL R. FRIEDMAN,
Notary Public in and for the County of Siskiyou,
State of California.

Service of the within Petition is hereby acknowledged and copy thereof received on this 9th day of May, 1949. It being stipulated that the hearing of the within Petition may be heard by the above-entitled Court on the 20th day of June, 1949.

/s/ FLOYD MERRILL,

Attorney for Montague Water Conservation District.

/s/ J. EVERETT BARR,

Attorneys for W. E. Buell,
Trustee.

[Endorsed]: Filed May 11, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION
TO STRIKE

To City of Montague and to Samuel R. Friedman,
its attorney:

You and each of you will please take notice that upon the 20th day of June, 1949, at the hour of 10:00 o'clock a.m. of said date, at the regular place of setting of the above entitled court in the Post Office Building at Sacramento, California, the respondent W. E. Buell will move this honorable court for its order to strike the "Petition for Equitable Relief" heretofore filed by the City of Montague.

Said motion will be made upon the grounds that the said petition is not a proper proceeding in a bankruptcy matter.

Said motion will be based upon this notice of motion and upon all of the records and filed in the above entitled matter.

Dated this 14th day of June, 1949.

BARR AND HAMMOND,
/s/ J. E. BARR,
Attorneys for W. E. Buell,
Trustee.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
EQUITABLE RELIEF

Now comes W. E. Buell, Trustee, and answering unto Petition for Equitable Relief on file herein admits, alleges and denies as follows:

I.

Admits paragraphs I, II, and III of said petition.

II.

Admits paragraph IV of said petition except that your trustee denies that no notice was given to petitioner and in connection therewith alleges that all notices which are required by law were given to the said petitioner.

III.

Answering paragraph V of said petition, admits that the City of Montague is the owner of the land described therein subject however to certain liens in favor of the Montague Water Conservation District; denies that said land or any portion thereof is to be used for municipal and governmental purposes.

IV.

Answering paragraph VI and VII of said petition, admits that assessments were made, denies that notice was not given.

V.

Answering paragraph VIII of said agreement admits that a composition agreement was entered into; admits that notices were given; denies that no notice was given to petitioner, and in connection therewith alleges that petitioner was not injured in any matter or form if notice was not given.

VI.

Admits paragraph IX and X of said petition except that said trustee denies that the property referred to in paragraph IX is municipally owned.

As a Separate, Second and Distinct Defense, the Trustee alleges as follows:

I.

That the petitioner has been guilty of laches and unreasonable delay in filing this petition in that the assessments complained of have been made for a period in excess of three (3) years and the Trustee relying upon said assessments has proceeded to include the said property contained herein in the general plans for the administration of the bankrupt estate.

Wherefore, respondent prays that petitioner take nothing by this petition.

Dated this 14th day of June, 1949.

BARR AND HAMMOND,

/s/ J. E. BARR,

Attorneys for W. E. Buell,
Trustee.

State of California,
County of Siskiyou—ss.

J. Everett Barr, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondent in the above entitled matter; that he has read the above and foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief, and as to such matters, that he believes it to be true;

That this verification is made by affiant instead of by said respondent, personally, for the reason that said respondent is absent from the County of Siskiyou, where said affiant has his office.

/s/ J. EVERETT BARR.

Subscribed and sworn to before me this 14th day of June, 1949.

[Seal]: /s/ MARJORIE SCHAFFER,
Notary Public in and for the County of Siskiyou,
State of California.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
EQUITABLE RELIEF

Comes now Montague Water Conservation District and answering unto petition for equitable relief on file herein, admits, alleges and denies as follows:

I.

Answering the allegations of Paragraphs I, II and III of said petition this answering respondent admits each and every, all and singular, the allegations therein contained.

II.

Answering the allegations of Paragraphs IV and V of said petition this answering respondent admits each and every, all and singular, the allegations therein contained.

III.

Answering the allegations of Paragraphs VI and VII of said petition this answering respondent admits each and all the allegations therein contained except denies that authority for such levy does not appear in the minutes or records of said District.

IV.

Answering the allegations of Paragraph VIII of said petition this answering respondent denies that no notice of any kind or nature were given to petitioner under the agreement referred to in said

paragraph and in this respect alleges that all legal notices required to be given by law and order of Court were duly and regularly given as appears from the files and records herein.

Wherefore, this answering respondent prays that petitioner take nothing by his said petition.

/s/ FLOYD MERRILL,

Attorney for Montague Water Conservation District, Respondent.

State of California,
County of Siskiyou—ss.

Orville L. Abbott, being duly sworn on behalf of the Irrigation District in the above-entitled action, says: That he is the Secretary of said Irrigation District; that he has read the foregoing Answer to Petition for Equitable Relief and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ ORVILLE L. ABBOTT.

Subscribed and sworn to before me this 15th day of June, 1949.

[Seal] /s/ FLOYD MERRILL,

Notary Public in and for the County of Siskiyou,
State of California.

My Commission Expires Feb. 5, 1951.

Service of copy acknowledged.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause.]

STIPULATION

The undersigned, Floyd Merrill, Esq., Attorney for the Montague Water Conservation District; Barr & Hammond, Esqs., Attorneys for Trustee, W. E. Buell; and Samuel R. Friedman, Esq., Attorney for the City of Montague, hereby stipulate to the following facts:

In reply to the letter of Honorable Dal M. Lemmon, dated October 28, 1949, it is hereby stipulated by and between the undersigned, that the indebtedness embraced in the composition agreement dated December 6, 1943, which agreement was approved by the above-entitled Court, and which indebtedness was agreed therein to be discharged under said composition agreement, is the same indebtedness for which the assessment was made by the Montague Water Conservation District against the real property of the City of Montague, commonly referred to as the airport property and described as being in Section 21, Township 45 North, Range 6 West, M.D.B. & M., and which property was expressly excluded from the said composition agreement. That is to say, the assessment levied by the said District against the said airport property described in the Petition and owned by the City of Montague, which property was expressly excluded from the composition agreement and does not appear therein, was

for the sole purpose of discharging the indebtedness set forth in said composition agreement.

Dated: November 4th, 1949.

/s/ FLOYD MERRILL,

Attorney for Montague Water
Conservation District.

/s/ J. EVERETT BARR,

Attorneys for Trustee,
W. E. Buell.

/s/ SAMUEL R. FRIEDMAN,

Attorney for City of
Montague.

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

MEMORANDUM

A petition for equitable relief has been filed herein by the City of Montague in which it seeks a holding by this court that the Montague Water Conservation District, bankrupt, is not entitled to levy a bond assessment against property owned by the city and used as a garbage dump, sewage disposal plant and airport, and more particularly described as follows:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-five North (T 45 N), Range Six West (R 6 W), M.D.B.&M., and any and all other property assessed by said district against said city, petitioner.

The property is outside the city limits.

By stipulation it is agreed that the assessment is based on and is for the purpose of discharging the indebtedness, the subject of the composition agreement.

Paragraph VIII of the petition alleges that the property in question was purposely omitted from the composition agreement entered into. This is not denied in the answer of the trustee and therefore must be deemed admitted.

Trustee contends that this court has no jurisdiction of the matter and that the petitioner is not harmed as it is in the same position as it was prior to the composition.

Composition is held to be in the nature of a contract. In *re Adler* 103 F 444, *Hanssen, et al v. Wingren* 121 F 2d 1011. *American United States Life Ins. Co. v. Haines City, Florida*, 117 F 2d 574, 576 states, "A composition, after confirmation, ought to be respected as a contract, and not disturbed in its substance for light cause, or so as to give one part an advantage over the other; and especially so after partial execution." The assessment of the land in question for the purpose mentioned if upheld changes the composition. This is so even though petitioner, with respect to the land in question, was not a party to the composition. The composition plan recites, "And whereas, the schedule has been prepared by the parties hereto in which each tract of land in the district has been listed and an amount set opposite the description of each tract, and such schedule has been attached

hereto and marked Exhibit "B" and by reference made a part of this contract." Since this purports to include all the land in the district, or by inference all the land that is to be charged with the composition, petitioner may rely upon the omission of its land in composition and the confirming order as a determination that this land is not subjected to the indebtedness.

The natural consequence of the submitted plan was to lull the city into a state of inaction thereby foregoing several courses of action open to it, to-wit—(1) pay the burden referred to in the composition as the "cash price" and receive releases therefor; (2) take advantage of the term price; (3) object to the amount of, or any assessment allocated against the property in question. If the relief asked for were not granted the City is in the position of being bound by an order which was made under the implied assurance mentioned.

This court has jurisdiction over this matter since it is here interpreting the effect of the plan of composition, and as such, a part of the bankruptcy proceedings. The bankruptcy court sitting as a court of equity will exercise the doctrine of estoppel when it seems proper.

Several years having intervened between the date of the approval of the plan of composition and the trustee's seeking to levy assessments against the property in question the trustee is estopped from now contending that petitioner's land should be assessed.

Therefore in accordance with the views expressed

herein the Directors of the Montague Water Conservation District should be ordered not to levy assessments on the parcel in question herein for the purpose of raising funds to discharge the indebtedness covered by the composition order. Counsel for the City of Montague is directed to serve and lodge findings and judgment in accordance with the local rule.

Dated: November 17th, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed November 17, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial and the court, sitting without a jury, heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

Finding of Fact

1. That the City of Montague is a municipal corporation of the State of California, duly organized and existing under the laws of the State of California as a City of the Sixth Class.

2. That the Montague Water Conservation District is a public corporation of the State of California, duly organized and existing under the laws

of the State of California, as more fully appears in the files of this Court respecting this action.

3. That W. E. Buell has heretofore constituted and appointed and now is the Trustee in Bankruptcy in the above-entitled matter and does represent the bond holding creditors of the bankrupt district.

4. That pursuant to proceedings had and taken in this Court, the Montague Water Conservation District and the creditor bond holders having claims against said district did on the 6th day of December, 1943, enter into a composition agreement approved by an order of this Court dated March 4, 1944, wherein the rights and obligations of said creditor bond holders and said Montague Water Conservation District were set forth; that the property hereinafter described and commonly referred to as the Airport Property and owned by the City of Montague, was expressly excluded from said Composition Agreement above mentioned, and that at no time was any notice of any character whatsoever, as provided by law, given to said City of Montague, indicating or giving notice of any liability against said property hereinafter described and owned by said City of Montague, by reason of the said Composition Agreement above referred to.

5. That the City of Montague is the owner in fee of and in possession of all of those certain lands, premises and appurtenances thereto, situate, lying and being in the County of Siskiyou, State of Cali-

fornia, and more particularly described as follows, to-wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-Five North (T 45 N), Range Six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

That the above described premises so owned by said City of Montague are devoted and used for a public airport, sewage disposal and garbage disposal.

6. That prior to the 4th day of March, 1944, and prior to the confirmation of the above-referred to Composition Agreement between the said W. E. Buell and the Montague Water Conservation District, notices were given to the property owners to be affected by the terms of said agreement; that said notices were given in a manner provided and approved by this Court; that no notices of any kind or nature were given to the City of Montague under said Composition Agreement, and that said agreement and the parties thereto purposely omitted the above described property of the City of Montague from the agreement and from any liability for the indebtedness owing to the bondholders.

7. That the assessment levied by the said Montague Water Conservation District against the property above described and owned by the City of Montague, which property was expressly excluded from the said Composition Agreement and does not appear therein, was for the sole purpose of dis-

charging the indebtedness set forth in said Composition Agreement.

8. That the Montague Water Conservation District, bankrupt, is not entitled to and is estopped from levying any bond assessment against the property above described and owned by the City of Montague with reference to the bond indebtedness set forth in said Composition Agreement.

9. That the assessment levied by the Montague Water Conservation District against the said property of the City of Montague for the bond indebtedness set forth in said Composition Agreement is set aside and vacated.

10. That there is no evidence in support of the answer of the Montague Water Conservation District.

11. That there is no evidence in support of the answer of the Trustee, W. E. Buell, and specifically that the City of Montague was not guilty of laches and unreasonable delay in filing its petition in the above-entitled matter.

Conclusions of Law

1. That the assessment levied by the Montague Water Conservation District against the said property hereinabove described and owned by the City of Montague be, and the same is hereby set aside and vacated, and the Montague Water Conservation District is ordered not to assess said property for

the said bond indebtedness set forth and mentioned in the composition agreement.

2. That the special defense of defendant, W. E. Buell, Trustee for the Montague Water Conservation District, bankrupt, must be dismissed.

It Is So Ordered, and counsel for petitioner will submit appropriate judgment in accordance herewith.

Dated: December 6, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

Service of Copy Acknowledged.

Lodged November 25, 1949.

[Endorsed]: Filed December 6, 1949.

In the United States District Court for the Northern District of California, Northern Division

No. 10503

In the Matter of the

MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

JUDGMENT

This cause came on to be heard before the above-entitled Court sitting without a jury, Samuel R. Friedman, Esq., appearing as attorney for the City of Montague; Barr and Hammond, Esqs., appearing as attorneys for W. E. Buell, Trustee; and Floyd Merrill, Esq., appearing as attorney for the Montague Water Conservation District, and evidence

both oral and documentary having been introduced and the cause having been argued by respective counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows:

It Is Hereby Ordered, Adjudged and Decreed, that the assessment levied by the Montague Water Conservation District against the real property and improvements thereon owned by the City of Montague and commonly known as the Airport Property, as hereinafter described, be, and the same is hereby set aside and vacated, and the said Montague Water Conservation District is ordered not to assess said property for the said bond indebtedness set forth in the Composition Agreement dated December 6, 1943.

That said property owned by said City of Montague and commonly known as the Airport property is situated in the County of Siskiyou, State of California, and more particularly described as follows, to-wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-five North (T 45 N), Range six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

Dated: December 6, 1949.

/s/ DAL M. LEMMON,
United States District Judge, Northern District of
California, Northern Division.

Lodged November 25, 1949.

[Endorsed]: Filed December 6, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO CIRCUIT COURT OF APPEALS

To the Montague Water Conservation District and
Floyd Merrill, Esq., Its Attorney, to the City
of Montague, Petitioner, and Samuel R. Fried-
man, Its Attorney:

Notice is hereby given that W. E. Buell, Trustee
above named, hereby appeals to the Circuit Court
of Appeals for the Ninth Circuit from the judgment
entered in this action on December 6th, 1949.

Dated this 15th day of December, 1949.

BARR & HAMMOND,
Attorneys for Appellants.
/s/ J. EVERETT BARR,

Service of Copy Acknowledged.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME
TO DOCKET APPEAL

It is hereby ordered that the Trustee herein have
to and including March 6, 1950, to docket the appeal
heretofore filed in the above entitled matter.

Dated this 13th day of February, 1950.

/s/ DAL M. LEMMON,
Judge of the U. S. District
Court.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

DESIGNATION OF POINTS
RELIED UPON APPEAL

To the Appellee of the Town of Montague and to
His Attorney Samuel R. Friedman:

You and each of you will please take notice that
the Appellant, Trustee W. E. Buell relies upon the
following points:

A. That the Court has no jurisdiction to hear
the petition of the Appellee of the Town of Montague.

B. That the Court erred by law in finding that
the said Town of Montague was injured by the
proposed action of bankrupt of the Montague Water
Conservation District.

C. That the Findings do not support the judgment.

Dated this 9th day of March, 1950.

BARR and HAMMOND,
/s/ J. EVERETT BARR,
Attorneys for Trustee and
Appellant.

Service of Copy Acknowledged.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

You will please take notice that the Appellee requests the following records and proceedings to be contained in the records on appeal.

- A. Petition of Appellee, the Town of Montague.
- B. Motion of the Trustee to strike.
- C. The answer of the Montague Water Conservation District and the answer of the Trustee.
- D. The opinion of the Court and Findings of the Court and the Judgment.

Dated this 8th day of March, 1950.

BARR and HAMMOND,
/s/ J. EVERETT BARR,
Attorneys for Trustee and
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME
TO DOCKET APPEAL

It is hereby ordered that the Trustee herein have to and including March 17; 1950, to docket the appeal heretofore filed in the above entitled matter.

Dated this 11th day of March, 1950.

/s/ DAL M. LEMMON,
Judge of the U. S. District
Court.

Service of Copy Acknowledged.

[Endorsed]: Filed March 11, 1950.

In the District Court of the United States for the
Northern District of California, Northern Division

Before: Hon. Dal M. Lemmon, Judge.

No. 10503

In the Matter of the:

MONTAGUE WATER CONSERVATION DIS-
TRICT,

Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON PETITION FOR EQUITABLE
RELIEF AND MOTION TO STRIKE

Monday, June 20, 1949

Appearances:

SAMUEL R. FRIEDMAN, ESQ.,

For the Peitioner,

City of Montague;

J. EVERETT BARR, ESQ.,

For W. E. Buell,

Trustee.

The Clerk: In re Montague Water Conserva-
tion District.

Mr. Barr: This is a motion by the town of
Montague to vacate certain assessments, the motion
being made by Mr. Friedman, for relief, I believe
he calls it, to vacate certain assessments on some
land owned by the town of Montague within the
Montague Conservation District, but outside of the

town boundaries, which, of course, would take it out of the usual question of governmental taxation, because of the constitutional amendment that one taxing agent cannot tax another's property outside of its own boundaries.

We have filed a motion to strike, is the reason I am speaking first, to Mr. Friedman's petition we have filed a motion to strike on the ground it is not something that should be considered in a separate action.

In other words, if the town of Montague or any other property owner—and in this case they are in no better position than a property owner—if they think there is an indirect assessment they would have their remedy in an action to vacate the assessment. It has little or nothing to do with the liquidation problems we have been dealing with in this proceeding, and for that reason we move to strike the petition.

Mr. Friedman: If your Honor please, in respect to counsel's motion to strike, I wish at this time to move to strike that motion on the ground there is insufficient notice and there are no authorities filed to support the motion, on the further ground this petition is proper in the bankruptcy proceedings, it is not a question of incorrect assessment. The property was not assessed at the time that all properties were assessed and incorporated in the composition agreement. The property in question does not appear in that agreement. We feel the Court has the power to determine this petition on the interpretation of the compromise agreement.

With respect to the petition by the City of Montague, your Honor, I wish to introduce a certified copy of deed to the property in question, showing the ownership in the City of Montague.

I also wish to introduce by stipulation a map showing the area that is commonly referred to as the airport area, which includes—the map will show the sewage disposal area of the city.

(The deed was marked Petitioner's Exhibit 1, and the map referred to was marked Petitioner's Exhibit Number 2.)

Mr. Friedman: If the Court please, this proceeding was brought to set aside the assessment made by the district against the lands owned by the city outside the city limits, and which assessment was an arbitrary assessment made by the district and subsequent to the composition agreement approved by this Court.

The City of Montague takes the position that the district is now estopped from making any assessment contrary to the composition agreement.

According to the pleadings and the files in this case, the plan of composition was filed with the Court pursuant to provisions of Sections 81 and 84 of the Bankruptcy Laws of the United States Government, and approved by this Court.

Now, the final composition provided among other things that the bondholders, through their trustee, W. E. Buell, will accept from any individual land owner in the district in full settlement of the liability of such land for the payment of all out-

standing bonds and coupons of the district, whether due or to become due, the amount set forth in Exhibit B opposite the description of such land in the column marked "cash price" and give full releases therefor; also there was provision for time payments in reference to Paragraph 1.

Now, all the property of the district which was to be assessed was set forth in this schedule, Exhibit B.

The property in question, which is owned by the City of Montague, was expressly left out of this composition agreement. To the best of our knowledge of the petitioner, it does not appear in the composition agreement at all. As a jurisdictional fact in this proceeding, all the parties affected were notified by proper notification,—one being by publication for the time required by the act, and another one was by mail, and personal service.

Now, part of the notice that was published provided "any land owners affected by the plan of composition may be entitled to a hearing upon making reasonable application thereof. The land owners therein are thereby referred to the petition and plan of composition attached thereto, now on file," and so forth.

Now, the record will show, I believe, that there is no return of service by the City of Montague with respect to the property. The City was not properly notified, they were not given the opportunity to make any objections whatsoever, and the notice directs—the notice to property owners listed

in Schedule B and part of the composition agreement——

The Court: The town was not so mentioned?

Mr. Friedman: No, your Honor, the town was not so mentioned, so actually as a matter of fact the only notice they had indirectly was that they would not be assessed, and they were lulled into a state of inaction.

Now, had the property been set forth in the compromise agreement, the city would have had three elective rights: one was to pay the full cash price and receive full relief; the second was to take advantage of the term price, and the third was to make objection as to the assessments or as to the amount of the assessment.

The City naturally has availed themselves of no rights, because they were not compelled to, they were not interested in any agreement.

Now, the compromise agreement being in the nature of a contract, and in this respect, your Honor, I wish to call your Honor's attention to an opinion made by your Honor in December of 1947 which covered a very similar point, and this is cited out of your Honor's opinion: "The compromise agreement being in the nature of a contract between the district and all creditors and between the creditors themselves, the parties to the composition should be governed by rules usual in contract matters."

Now, the California Code of Civil Procedure, Section 1962, Subdivision (3) provides that:

"Whenever a party has by his own declaration, act, or omission intentionally and deliberately led

another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Now, the compromise plan has expressly included the property, and no effort was made for three years to make an arbitrary assessment, and the trustee, Mr. Buell, in behalf of the bondholders, induced the district to make this assessment, and the district then went ahead and assessed the property for some \$8,000, in violation of the compromise agreement. Now, the act of omission caused the City to be lulled into a state of inaction. They were not required to do anything.

At this time practically all of the properties in the district have been released by payment to the amount—as to the amounts allocated against them in Schedule B. This property is not in there. To make such assessment at this time would be prohibitive. As I understand it, it would run into a million or two for a piece of property that is worth probably Fifteen or Twenty Thousand Dollars.

The position of the City is that the district should be estopped from making any assessment against the City's property, and the assessments arbitrarily made should be set aside.

And, as I stated to your Honor, the date of your Honor's opinion on the previous point which your Honor decided was December 23, 1947, and in that opinion your Honor held that although the churches are not exempt because they had not availed them-

selves of the exemption statute, that to come in afterwards and assess them the district was estopped.

Now, the petition alleges that the City received no notice. The answer by the trustee for the district alleges that notice was given. However, the answer by the district admits that there is no proper notice, and with respect to notice I refer your Honor to the files and the record.

The Court: You have a memorandum, have you, on file here?

Mr. Friedman: I beg your pardon?

The Court: Have you a memorandum on these authorities?

Mr. Friedman: The authorities I have cited to your Honor?

The Court: Yes.

Mr. Friedman: I have taken them out of your Honor's opinion.

The Court: I wondered if you had a memorandum on file?

Mr. Friedman: No, I have not, but I can furnish one, your Honor. The authorities I have cited here a few minutes ago were taken from your Honor's opinion of December 23, 1947 with respect to the church properties in Montague; but the position now of the city is that the district is estopped, and for the reasons that to allow any assessments would be in violation of the composition agreement, the City was denied their right to compromise the bonded indebtedness, such as the property owners listed in the composition agreement, and the bond-

holders would receive property not contemplated in the composition agreement, and that the notice was jurisdictional, and that the City would deprive it of property without due process of law.

Mr. Barr: I wanted to put on some evidence, unless we stipulate—would you stipulate if Mr. Abbott were called he would testify he is the Secretary of the District, he is in charge of the books, and that the assessment rolls were approved and published in September, 1944 and 1945?

Mr. Friedman: That they were?

Mr. Barr: Yes.

Mr. Friedman: I don't feel it is material, your Honor. We have not raised any point with respect to that.

Mr. Barr: I just want to get the record straight; you are not attacking the validity of the assessment?

Mr. Friedman: Not at this time. We are relying solely on the estoppel principle.

Mr. Barr: Well, that being the case, we do not desire to put on any evidence.

Here is our position, your Honor: In the church case your Honor held there was an estopped because the churches could have gone ahead and filed affidavits claiming exemption, but because of the composition agreement they were lulled into inaction; but in this case the City of Montague is in no different position than if this composition agreement had never existed, the City of Montague is in no better position than if bankruptcy number 10,503 had never been filed.

The City of Montague is bound to do something that the law requires it to do, to pay taxes. It is not hurt——

The Court: In other words, the issue of estoppel is not present here because there is no damage to the city, is that the point?

Mr. Barr: That is right; and for that reason we can see no question of estoppel, because let us suppose that this proceeding had never gone through. There is still no question but that if the directors had been carrying out the law and doing what the law said, they would still have to make a levy to pay the bond issue.

The Court: How about this question of notice never having been given to the city?

Mr. Barr: I don't think they are hurt by it, because they wouldn't be hurt by it any more than if Mr. Day owed me a dollar and Mr. Jones owed me a dollar and I told Mr. Day that I would take fifty cents off his indebtedness, Mr. Jones would have no complaint, because it strictly is purely a beneficiary contract all the way through, and the mere fact that either by omission or by intent we did not give the City of Montague the benefit that we gave the other land owners does not hurt the City of Montague, because they are only doing what they are required to do, and that is to pay the assessment as required by law and by the Water Code of the State of California.

The Court: I would like to have this submitted on memorandums.

Mr. Friedman: Could I have a rather lengthy time for my memorandum, because we are having vacations up in my office. How long would you want, Counsel?

Mr. Barr: Oh, two weeks.

Mr. Friedman: Well, an additional two weeks would be all right.

The Court: Two weeks, two weeks, and one week?

Mr. Friedman: All right.

[Endorsed]: Filed March 6, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in the Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the Trustee.

Petition for Equitable Relief.

Notice of Motion to Strike.

Answer of W. E. Buell, Trustee to Petition.

Answer of Montague Water Conservation District to Petition.

Stipulation of the Parties.

Memorandum.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Appeal.

Order Extending Time to Docket Appeal.

Designation of Points Relied on Appeal.

Designation of Contents of Record on Appeal.

Order Extending Time to Docket Appeal.

Reporters Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 14th day of March, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 12502. United States Court of Appeals for the Ninth Circuit. W. E. Buell, Trustee for the Bond Holding Creditors of the Montague Water Conservation District, Appellant, vs. Montague Water Conservation District, Bankrupt and The City of Montague, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.